

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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ABDUL HOWARD,,

Plaintiff,

Case No. . 2:11-cv-01698-RFB-NJK

## ORDER

V.

STATE OF NEVADA, et al.,

## Defendants.

Defendants Philip J. Kohn and Darren G. Cox's Motion to Dismiss (Dkt. No. 29)

## I. INTRODUCTION

Before the Court is a Motion to Dismiss (Dkt. No. 29) filed jointly by Defendants Philip J. Kohn and Darren G. Cox (collectively, “Defendants”), attorneys employed by the Clark County Public Defender’s Office. Upon consideration of the motion and supplemental pleadings on file, the motion is granted for the reasons stated below.

## II. BACKGROUND

The facts in this case date back to 2003, when Plaintiff Abdul Howard was facing criminal charges in the District Court of Clark County, Nevada. Howard states in his Complaint that on February 8<sup>th</sup>, 2003, he met with Cox, his public defender, and signed a plea agreement. According to the Complaint, this agreement did not indicate that he was pleading guilty to a sexual offense. During his conversation with Cox, Howard alleges that Cox told him to sign his initials in a blank area on the front page of the agreement, which Howard did. On April 10<sup>th</sup>, 2003, the plea agreement was presented and entered in court. Howard alleges that without his knowledge or consent, Cox inserted a statement into his plea agreement next to his initials which stipulated that Howard had committed a sexual offense.

1           Howard brought a civil rights complaint against Cox and Kohn (Cox's supervisor and the  
 2 head Clark County Public Defender) pursuant to 42 U.S.C. § 1983. Howard alleges that this  
 3 interlineation in his plea agreement was not mentioned at his plea allocution and that it caused  
 4 him to be denied parole in July of 2011 and to serve an additional four months in prison. Howard  
 5 also states that he was not aware of the interlineation until 2010 when he requested a copy of his  
 6 judgment of conviction. In his complaint, Howard alleges various constitutional violations based  
 7 on the denial of his liberty through Cox's presentment of the plea agreement containing the  
 8 interlineation to the district court, as well as fraud and RICO claims. Howard seeks  
 9 compensatory damages, punitive damages, and for Cox to be investigated, disbarred and charged  
 10 with contempt of court.

11           In their motion to dismiss, Defendants argue that Howard's § 1983 claim is barred by  
 12 Heck v. Humphrey, 512. U.S. 477 (1994), and Edwards v. Balisok, 520 U.S. 641 (1997), and that  
 13 his fraud claim is barred under a similar doctrine in Nevada law as pronounced in Morgano v.  
 14 Smith, 110 Nev. 1025 (1994). In addition, Defendants argue that the § 1983 claim is barred  
 15 because Cox, as a public defender engaged in the traditional functions of criminal defense  
 16 counsel, was not acting under color of state law for the purposes of § 1983. , Defendants also  
 17 contend that Howard's § 1983 claim against Kohn should be dismissed for failure to allege that  
 18 the interlineation was done pursuant to any official policy or custom as required by Monell v.  
 19 Dept. of Social Services, 436 U.S. 658, 690-91 (1978). Defendants further argue that Howard's  
 20 claims for fraud and RICO violations are insufficiently plead and that punitive damages are  
 21 unavailable under Nevada law for tort claims against government officials. Finally, Defendants  
 22 argue that this Court is barred from hearing Howard's claims under the Rooker-Feldman  
 23 doctrine.

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### **III.    LEGAL STANDARD**

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          An initial pleading must contain "a short and plain statement of the claim showing that  
 the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The court may dismiss a complaint for  
 "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In ruling on

1 a motion to dismiss, “[a]ll well-pleaded allegations of material fact in the complaint are accepted  
 2 as true and are construed in the light most favorable to the non-moving party.” Faulkner v. ADT  
 3 Sec. Services, Inc., 706 F.3d 1017, 1019 (9<sup>th</sup> Cir. 2013) (citations omitted). In addition,  
 4 documents filed by a plaintiff who is proceeding without counsel (as is the case here) must be  
 5 liberally construed, and a pro se complaint must be “held to less stringent standards than formal  
 6 pleadings drafted by lawyers.” Erickson v. Pardus, 551 U.S. 89 (2007) (quoting Estelle v.  
 7 Gamble, 429 U.S. 97, 106 (1976)) (internal citations and quotation marks omitted); see also  
 8 Butler v. Long, 752 F.3d 1177, 1180 (9<sup>th</sup> Cir. 2014).

9 To survive a motion to dismiss, a complaint need not contain “detailed factual  
 10 allegations,” but it must do more than assert “labels and conclusions” or “a formulaic recitation  
 11 of the elements of a cause of action . . . .” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting  
 12 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). In other words, a claim will not be  
 13 dismissed if it contains “sufficient factual matter, accepted as true, to state a claim to relief that is  
 14 plausible on its face,” meaning that the court can reasonably infer “that the defendant is liable for  
 15 the misconduct alleged.” Id. at 678 (internal quotation and citation omitted). The Ninth Circuit,  
 16 in elaborating on the pleading standard described in Twombly and Iqbal, has held that for a  
 17 complaint to survive dismissal, the plaintiff must allege non-conclusory facts that, together with  
 18 reasonable inferences from those facts, are “plausibly suggestive of a claim entitling the plaintiff  
 19 to relief.” Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9<sup>th</sup> Cir. 2009).

20 Allegations of fraud or mistake in a complaint are exposed to heightened scrutiny. In  
 21 pleading such allegations, the plaintiff “must state with particularity the circumstances  
 22 constituting fraud or mistake.” Fed. R. Civ. P. 9(b). The plaintiff must also “set forth what is  
 23 false or misleading about a statement, and why it is false.” Ebeid ex rel. U.S. v. Lungwitz, 616  
 24 F.3d 993, 998 (9<sup>th</sup> Cir. 2010) (internal quotations omitted). Thus, claims of fraud or mistake must  
 25 meet Rule 8’s plausibility requirement as well as Rule 9(b)’s particularity requirement. Cafasso,  
 26 U.S. ex rel. v. General Dynamics C4 Systems, Inc., 637 F.3d 1047, 1055 (9<sup>th</sup> Cir. 2011).

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1                   **IV. DISCUSSION**

2                   As stated above, the Court will construe Howard's pro se Complaint liberally. Howard's  
 3 Complaint alleges the violation of 42 U.S.C. § 1983 by both Defendants, as well as fraud and  
 4 RICO claims.

5                   In his response to Defendants' motion to dismiss, Howard attached several exhibits,  
 6 including a copy of the plea agreement and minutes of the criminal proceedings and appeals  
 7 pertaining to his conviction in state court. A Rule 12(b)(6) motion to dismiss must be treated as a  
 8 Rule 56 motion for summary judgment if the court relies on materials outside the pleadings  
 9 submitted by either party to the motion to dismiss. Anderson v. Angelone, 86 F.3d 932, 934 (9<sup>th</sup>  
 10 Cir. 1996). However, the court has discretion to exclude such materials, and "[a] Rule 12(b)(6)  
 11 motion to dismiss supported by extraneous materials cannot be regarded as one for summary  
 12 judgment until the district court acts to convert the motion by indicating, preferably by an  
 13 explicit ruling, that it will not exclude those materials from its consideration." Swedberg v.  
 14 Marotzke, 339 F.3d 1139, 1144, 1146 (9<sup>th</sup> Cir. 2003). Accordingly, because the Court anticipates  
 15 that further evidence may come to light if the case proceeds, the Court will not consider  
 16 Howard's extrinsic material and will rule upon the motion to dismiss without consideration of  
 17 extrinsic evidence.

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19                   **A. Rooker-Feldman Doctrine**

20                   It should be noted at the outset that Defendants seek the dismissal of all of Howard's  
 21 claims under the Rooker-Feldman doctrine, which bars federal district courts from hearing "de  
 22 facto appeal[s]" from state court judgments. Kougasian v. TMSL, Inc., 359 F.3d 1136, 1139 (9<sup>th</sup>  
 23 Cir. 2004). However, Rooker-Feldman does not apply in this case. Howard is not "assert[ing] as  
 24 a legal wrong an allegedly erroneous decision by a state court, and seek[ing] relief from a state  
 25 court judgment based on that decision"; if he were, Rooker-Feldman would bar subject matter  
 26 jurisdiction. Noel v. Hall, 341 F.3d 1148, 1163 (9<sup>th</sup> Cir. 2003). Rather, Howard's claims refer to  
 27 alleged injuries caused by an adverse party, and such claims are not barred by Rooker-Feldman.  
 28 Id.; see also Kougasian, 359 F.3d at 1140 ("Rooker-Feldman thus applies only when the federal

1 plaintiff both asserts as her injury legal error or errors by the state court *and* seeks as her remedy  
 2 relief from the state court judgment.”) (emphasis in original).

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#### **B. Section 1983 Claims**

5 Howard’s Section 1983 claims against the Defendants must be dismissed. First, these  
 6 claims represent an impermissible collateral attack on his criminal conviction. Second, his  
 7 complaint does not allege conduct by Cox that is recognized as being under the color of state  
 8 law.

9 Howard asserts that Cox, who was employed as his public defender in Clark County  
 10 District Court, asked Howard to sign and initial his plea agreement and thereafter inserted a  
 11 sentence next to Howard’s initials stating that Howard stipulated that his offense was sexually  
 12 motivated. He argues that Cox’s action caused him to be labeled a sex offender and to be denied  
 13 parole, leading to an additional four months in prison. Construing Howard’s complaint liberally,  
 14 with respect to his Section 1983 claims Howard is claiming that Cox unconstitutionally deprived  
 15 him of his liberty under color of state law by inducing him to enter a plea and sign an underlying  
 16 plea agreement without full knowledge of the facts within the plea and its consequences.

17 “A guilty plea ‘is valid only if done voluntarily, knowingly and intelligently, with  
 18 sufficient awareness of the relevant circumstances and likely consequences.’” Barrios v. Dexter,  
 19 506 F. App’x. 619, 621 (9<sup>th</sup> Cir. 2013) (quoting Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005)).  
 20 A plea is invalid and thus cannot support a conviction if a criminal defendant is not aware of “the  
 21 nature of the charges against him,” Bradshaw, 545 U.S. at 182, or if he does not understand “the  
 22 consequences of his plea, including the range of allowable punishment that will result from his  
 23 plea.” Tanner v. McDaniel, 493 F.3d 1135, 1147 (9<sup>th</sup> Cir. 2007) (internal quotation omitted).

24 In this case, Howard alleges that a stipulation that his conviction was for a sexual offense  
 25 was inserted into his plea agreement without his knowledge. He argues that this interlineation  
 26 caused him to serve additional time in prison and to be “slander[ed]” and called a sex offender  
 27 by the probation and parole department. Complaint at 7. These allegations constitute an attack on  
 28 Howard’s plea agreement, as a ruling for Howard in this case would necessarily require the

1 Court to invalidate his plea and vacate the underlying conviction: if Howard's claims are true, his  
 2 plea was not knowing and voluntary because he was not fully aware of the facts to which he  
 3 admitted during his plea and did not fully understand all of the consequences of his plea.

4 In Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), the U.S. Supreme Court held that  
 5 "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for  
 6 other harm caused by actions whose unlawfulness would render a conviction or sentence invalid,  
 7 a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal,  
 8 expunged by executive order, declared invalid by a state tribunal authorized to make such  
 9 determination, or called into question by a federal court's issuance of a writ of habeas  
 10 corpus . . ." Therefore, a § 1983 claim is barred by Heck if "a judgment in favor of the plaintiff  
 11 would necessarily imply the invalidity of his conviction or sentence" and if the conviction or  
 12 sentence has not already been invalidated or called into question. Id. at 487. Heck recognizes the  
 13 longstanding principle that valid criminal convictions are not properly subject to collateral attack  
 14 through civil tort actions. Id. at 486.

15 Applying Heck to this case, it is clear that Howard's claim constitutes an attack upon the  
 16 knowing and voluntary nature of his guilty plea and that a ruling that Defendants' actions were  
 17 unlawful would necessarily invalidate Howard's conviction. Howard has made no showing that  
 18 his conviction has been reversed, expunged, invalidated, or called into question by a writ of  
 19 habeas corpus. Further, a showing that Howard has fully served his sentence in connection with  
 20 the conviction at issue here would not remove Howard's claim from the requirements of Heck.  
 21 See Guerrero v. Gates, 442 F.3d 697, 704-05 (9<sup>th</sup> Cir. 2003) (holding that "[t]he fact that  
 22 Guerrero is no longer in custody and thus cannot overturn his prior convictions by means of  
 23 habeas corpus does not lift Heck's bar," and stating that exceptions to Heck do not apply in the  
 24 case at hand). Thus, Heck applies and Howard's § 1983 claim for damages against Cox cannot  
 25 proceed.

26 In addition to damages, Howard seeks injunctive relief against Cox. Although Heck itself  
 27 only involved a claim for damages, the Supreme Court has extended its underlying principle to  
 28 apply regardless of the type of remedy sought. Edwards v. Balisok, 520 U.S. 641, 648 (1997);

1        Whitaker v. Garcetti, 486 F.3d 572, 584 (9<sup>th</sup> Cir. 2007) (“[T]he sole dispositive question  
 2        [regarding application of the Heck doctrine] is whether a plaintiff’s claim, if successful, would  
 3        imply the invalidity of his conviction.”). Howard’s claims for injunctive relief against Cox are  
 4        therefore barred as well.

5            The Court notes, however, that at the hearing on this motion Howard produced a copy of  
 6        an order from the Supreme Court of Nevada (Dkt. No. 58) directing the Clark County District  
 7        Court to do one of three things: enter a written order of its decision to deny Howard’s motion to  
 8        amend the judgment of conviction, or issue written notice to the Supreme Court that it is  
 9        reconsidering its decision, or inform the Supreme Court of its need for additional time. If the  
 10        district court states that it is reconsidering its ruling on Howard’s motion to amend the judgment  
 11        of conviction, the analysis under Heck may differ.

12           Notwithstanding the Heck bar, Howard’s § 1983 claim against Cox is also precluded  
 13        because Cox was not acting under color of state law for purposes of the statute. In Polk County  
 14        v. Dodson, 454 U.S. 312, 325 (1981), the Supreme Court held that “a public defender does not  
 15        act under color of state law when performing a lawyer’s traditional functions as counsel to a  
 16        defendant in a criminal proceeding.” Although there are limited exceptions to this rule for  
 17        lawyers performing “certain administrative, and possibly investigative, functions,” Georgia v.  
 18        McCollum, 505 U.S. 42, 54 (1992), none are applicable here. Cox was serving as Howard’s  
 19        counsel and assisting in the negotiation of a plea agreement, which is clearly a traditional  
 20        function of criminal defense counsel. See Bowman v. Swinney, 46 F.3d 1138, at \*2 (9<sup>th</sup> Cir.  
 21        1995) (affirming the district court’s dismissal under Polk County of § 1983 claim against a  
 22        public defender for actions taken while serving as counsel in a criminal proceeding). Howard is  
 23        thus barred, absent additional facts that Cox was not acting within his traditional functions as a  
 24        defense attorney, from asserting a § 1983 claim against Cox.

25           Howard’s § 1983 claim against Defendant Kohn is likewise barred by Heck, as a finding  
 26        that Kohn participated in or ratified the alleged interlineation would necessarily imply the  
 27        invalidity of Howard’s conviction.

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1           Additionally, the claim against Kohn, even liberally construed, is merely a conclusory  
 2 allegation that he violated the statute, without any supporting facts that would enable a court to  
 3 reasonably infer “that the defendant is liable for the misconduct alleged.” Iqbal, 556 U.S. at 678  
 4 (quoting Twombly, 550 U.S. at 556). Howard has alleged no facts supporting a claim that Kohn  
 5 is liable under § 1983 for his own acts; indeed, Howard has not alleged any action by Kohn at  
 6 all. Similarly, Howard has not alleged any official policy or custom that was the source of his  
 7 injury, as he must in order to successfully assert a § 1983 claim against an agent of a  
 8 governmental entity sued in his official capacity. See Monell v. Dept. of Social Servs. of City of  
 9 New York, 436 U.S. 658, 690, 694 (1978); Galen v. County of Los Angeles, 477 F.3d 652, 667  
 10 (9<sup>th</sup> Cir. 2007) (in order to prevail on a § 1983 claim against a municipality, the plaintiff “was  
 11 required to establish . . . a deliberate policy, custom, or practice that was the ‘moving force’  
 12 behind the constitutional violation he suffered.”) (quoting Monell, 436 U.S. at 694).  
 13 Accordingly, Howard’s § 1983 claims are dismissed.

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### **C. RICO and Fraud Claims**

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1                   **V. CONCLUSION**

2                   All of Howard's claims would necessarily imply the invalidity of his conviction, and  
 3 Howard has made no showing that his conviction was already invalidated or otherwise called  
 4 into question as Heck demands. Therefore, Howard is barred from collaterally attacking the  
 5 conviction in this civil action. However, in light of the order from the Nevada Supreme Court  
 6 directing the district court to enter a decision on Howard's motion to amend the judgment of  
 7 conviction, and because "[l]eave to amend should be granted unless the pleading could not  
 8 possibly be cured by the allegation of other facts, and should be granted more liberally to pro se  
 9 plaintiffs," Lira v. Herrera, 427 F.3d 1164, 1176 (9<sup>th</sup> Cir. 2005) (internal quotations and citations  
 10 omitted), the Court will grant Howard additional time to file an amended complaint containing  
 11 evidence that his claims are not barred by Heck.

12                   IT IS THEREFORE ORDERED that Defendant Philip J. Kohn's and Defendant Darren  
 13 G. Cox's Motion to Dismiss (Dkt. No. 29) is GRANTED without prejudice. Plaintiff Abdul  
 14 Howard's Complaint (Dkt. No. 7) is DISMISSED with leave to amend. Howard shall have until  
 15 December 22, 2014 to amend his complaint with evidence that his conviction has been  
 16 invalidated. If he does not do so, this action shall be dismissed without prejudice to Howard  
 17 reasserting his claims in the event that his conviction is later invalidated. IT IS FURTHER  
 18 ORDERED that the parties shall notify the Court of any significant ruling or opinion from any  
 19 Nevada state court with respect to Howard's related state case challenging aspects of his state  
 20 conviction.

21                   DATED this 30<sup>th</sup> day of September, 2014.

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23                   RICHARD F. BOULWARE, II.  
 24                   UNITED STATES DISTRICT JUDGE

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